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No. 04-131

IN THE

Supreme Court of the United States

PACIFIC GAS AND ELECTRIC CO. AND PG&E CORP.,
Petitioners,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF OF THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. The Ruling Below Is Wrong On The Merits And Has Manifest Importance To The Administration Of The Bankruptcy System.

The petition for certiorari demonstrated that the Ninth Circuit's construction of Section 1123(a)(5) is contrary to the statute's plain language and the decisions of this Court and other courts of appeals. No other court agrees with the Ninth Circuit's counter-textual conclusion that Congress's directive that a plan of reorganization will be effective "notwithstanding *any* otherwise applicable nonbankruptcy law" limits the preemption of state law merely to laws "*relating to financial condition*" (emphasis added), *i.e.*, the scope of Section 1142(a) of the Bankruptcy Code. It is therefore not surprising that respondents almost entirely fail to defend the Ninth Circuit's ruling and instead propose a new reading of Section 1123(a)(5) that only confirms that certiorari is warranted.

1. According to respondents, "[t]he syntactically complex 'notwithstanding' clause of section 1123(a) is hardly self-defining." BIO 21. In fact, there is nothing "complex" or otherwise ambiguous about the statute's provision that a plan of reorganization is effective "notwithstanding *any* otherwise applicable nonbankruptcy law" (emphasis added). There is no reasonable way to read "any" to mean (as the Ninth Circuit held) "relating to financial condition" or (as respondents propose) "non-regulatory."

The Ninth Circuit's refusal to give Sections 1123(a)(5) and 1142(a) the distinct meanings that their texts require is, moreover, contrary to common sense and this Court's precedent. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 542 (2001). The case cited by respondents – *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002) – is not to the contrary. *Ours Garage* held that a reference to a "State" in an exception to a preemption provision also encompassed municipalities when the

preemption provision itself referred to a "State" and its "political subdivision." *Id.* at 428. The Court reasoned that the so-called *Russello* presumption – that Congress's use of different words in two provisions signifies that those provisions have a different meaning – was overcome because the exception differed from the general preemption provision in other ways: "The *Russello* presumption * * * grows weaker with each difference in the formulation of the provisions under inspection." *Id.* at 435-36.

Here, by contrast, the Ninth Circuit erred in according identical preemptive scope to Sections 1123(a)(5) and 1142(a). The two provisions have different texts and address different issues. Section 1123(a)(5) addresses the implementing transactions of a plan of reorganization, while Section 1142(a) is concerned with post-reorganization events. See Pet. 20. Contra BIO 24 (asserting that petitioners' construction would render Section 1142(a) superfluous). Section 1142(a) thus "deal[s] not with substantive provisions of a plan but rather with the effectuation of a confirmed plan" and, in particular, was intended to make clear that, after reorganization, the reorganized debtor is not authorized "to *carry out* the plan in violation of net capital and other financial condition rules." *In re Public Service Co. of N.H.*, 108 B.R. 854, 886-87 (Bankr. D.N.H. 1989). That is precisely the distinction drawn by the excerpt from the Collier bankruptcy treatise on which respondents mistakenly rely. Section 1123(a)(5) does not provide authority to preempt state law restrictions on *post-reorganization* operations such as through "the transfer of a broadcast license or a license to sell alcoholic beverages." 8 COLLIER ON BANKRUPTCY ¶ 1142.03[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004), *quoted at* BIO 17 n.15. Instead, under the statute, "[t]he alternatives set forth in section 1123(a)(5) are self-executing – that is, the plan may propose such actions notwithstanding nonbankruptcy law or agreement." 7

COLLIER ON BANKRUPTCY ¶ 1123.01[5] (15th ed. 1996 & Supp. 2004).[1]

Respondents also err in contending that petitioners' reading would produce absurd results such as "transfers of environmentally hazardous substances." BIO 20-21. First, as discussed *supra*, Section 1123(a)(5) does not preempt state and local law on an ongoing basis, post-reorganization. Accordingly, unless the recipient of toxic waste were otherwise authorized by state and federal law to handle such materials on an ongoing basis, Section 1123(a)(5) would not permit the proposed transfer. Moreover, the issue of reconciling Section 1123(a)(5) with other federal laws (such as those regarding toxic waste) is a matter of harmonization, not preemption.

Although respondents suggest that petitioners' position would, supposedly, lead to the preemption of federal law, they ultimately concede in a footnote (BIO 27 n.22) that the question is one of harmonizing competing provisions of federal law. Contrary to respondents' suggestion (*id.* 28), petitioners have long made clear that the more specific provisions of federal licensing law might well be deemed to control over provisions of bankruptcy law. See, *e.g.*, Petrs. C.A. Br. 69 ("Faced with two controlling federal directives—such as one stating that a reorganization will be implemented 'notwithstanding' other law, and another specifically forbidding a particular transaction such as the export of a product or a type of merger—"[i]t is an elementary tenet of statutory construction that '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified

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[1] The statutes that respondents cite to illustrate that Congress "structured the Bankruptcy Code and related statutes to preserve state regulatory authority" (BIO 28-29) prove petitioners' point. They demonstrate that Congress knows how to reserve power to the states when it wishes to do so; none would have been necessary if there were an overarching bankruptcy principle that a debtor must comply with state regulatory law.

by a general one * * *." (quoting *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375 (1990) (citation omitted))).

2. Nor can the decision below be rescued by resort to the "presumption against preemption." To the contrary, as the petition established, the Ninth Circuit's reliance on that presumption conflicts with this Court's precedents. See Pet. 20-23. Respondents have no answer to the fact that bankruptcy law and energy law are the traditional domains of federal, not state, regulation. See *id.* 22-23. Nor can any "presumption" overcome Section 1123(a)(5)'s unambiguous application to "any" state law. And, in any event, the proper construction of a preemption provision (the question in this case) is antecedent to and distinct from the question whether a particular state statute is impliedly preempted by a federal statute under the rubric of "conflict" preemption. See *id.* 20-21.

3. The petition furthermore established that the proper construction of Section 1123(a)(5) is vital to the orderly functioning of federal bankruptcy law. See Pet. 12-14. Virtually every reorganization will, of necessity, require that state law – at the very least, state property law – be superseded. Section 1123(a)(5) is, moreover, the sole source of authority for myriad basic bankruptcy tools that are essential elements of any successful reorganization plan. For example, unless state law is superseded, a plan of reorganization could not modify a lien, waive a default, or extend a maturity date, see 11 U.S.C. 1123(a)(5)(E), (G), & (H), without the creditor's consent – notwithstanding the fact that these tools are essential features of successful bankruptcy plans, see 7 COLLIER ON BANKRUPTCY ¶ 1123.01[5], *supra*. This case accordingly has great significance for all manner of ongoing bankruptcy proceedings.

II. The Ninth Circuit's Decision Conflicts With Rulings Of Other Circuits And This Court.

1. The petition demonstrated the square conflict between the Ninth Circuit's construction of Section 1123(a)(5) and decisions of other circuits, including particularly the Fourth Circuit's ruling in *Universal Cooperatives, Inc.* v. *FCX, Inc. (In re FCX, Inc.)*, 853 F.2d 1149 (1988), cert. denied, 489 U.S. 1011 (1989). Whereas the Ninth Circuit held that Section 1123(a)(5) merely preempts state law relating to the debtor's financial condition, the Fourth Circuit broadly held that Section 1123(a)(5) is "an empowering statute" that "does not simply provide a means to exercise the debtor's pre-bankruptcy rights," but in fact "enlarges the scope of those rights," 853 F.2d at 1155. Respondents' characterization of *FCX* as merely "approv[ing] modification of a creditor's contractual rights," BIO 17, is incorrect, as this Court recognized in citing *FCX* as a case in which the courts of appeals have construed "notwithstanding" clauses "to supersede other laws," *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993).

Respondents contend that *FCX* is distinguishable because that case, unlike this one, did not involve state "regulatory" law. BIO 15, 17. Respondents urged that argument below, but the court of appeals rejected it, instead limiting the statute's preemptive scope to laws relating to the debtor's financial condition. Indeed, respondents' "regulatory/non-regulatory" distinction does not appear in Section 1123(a)(5) or in *any* decision construing the statute, even the Ninth Circuit's. Respondents' proposed distinction is, moreover, illusory in practice: *all* law that must be overridden by a plan of reorganization is "regulatory" in relevant respects, for it governs the property rights of debtors and creditors.

Respondents also offer an extended explanation of various bankruptcy provisions that could be invoked to make "[t]he result in *FCX*" consistent with the outcome in this case. See BIO 15-17. That is simply incorrect: an essential

element of the Fourth Circuit's reasoning was that the transaction at issue in that case was authorized by Section 1123(a)(5), which overcame the creditors' state-law rights. Because those rights have nothing to do with the "debtor's financial condition," the Ninth Circuit would hold that they are not preempted by the Bankruptcy Code.

Nor can the Ninth Circuit's ruling be rationalized with the conclusion of other circuits and district courts that Section 1123(a)(5) both expressly authorizes the restructuring measures set forth in the statute and preempts contrary state law. See Pet. 10-11 & n.3. For example, respondents would distinguish the facts of the Tenth Circuit's decision in *Wade* v. *Bradford*, 39 F.3d 1126 (1994), as involving the preemption of state property law, BIO 18, while they dismiss the Third Circuit's citation of Section 1123(a)(5) as an example of "the explicit language that Congress uses when it intends to displace state nonbankruptcy law," *Integrated Solutions, Inc.* v. *Service Support Specialties, Inc.*, 124 F.3d 487, 493 (1997), as mere "dicta" that "says nothing about the scope of express preemption," BIO 18. In so doing, however, respondents ignore two essential points: both the Third and Tenth Circuits, like the Fourth Circuit in *FCX*, regard Section 1123(a)(5) as an "empowering" statute that overrides nonbankruptcy law, and neither agrees with the Ninth Circuit's construction of Section 1123(a)(5) as preempting only state laws "relating to financial condition."

Respondents' construction of Section 1123(a)(5) also cannot be reconciled with this Court's conclusion in *Holywell Corp.* v. *Smith*, 503 U.S. 47, 55 (1992), that the statute "authoriz[es] a plan to transfer 'all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan.'" According to respondents, "*Holywell* did not state or imply, however, that a plan may authorize an *illegal* transfer of property." BIO 20 (emphasis in original). But *all* involuntary transfers of property under a plan of reorganization are "illegal" in the relevant sense: that they are prohibited by state property law

that must be preempted in order for the reorganization to take effect.

The ruling below not only gives rise to a conflict over the meaning of Section 1123(a)(5) but also exacerbates a broader, pre-existing conflict created by a large body of Ninth Circuit precedent over the proper construction of the numerous provisions of federal law instructing that a statute be given effect "notwithstanding any" contrary state law. See Pet. 14-18. Respondents note that the cases cited by the petition involve "widely varying statutes." BIO 23. But that is precisely the point: in all those varying contexts, this Court and circuits other than the Ninth consistently give "nothwithstanding any" preemption provisions their natural, broad reading. This case accordingly has substantial significance for the proper construction of preemption provisions in an array of federal statutes.

III. Certiorari Should Not Be Denied On The Ground That The Petition Is Moot.

The petition explained, and respondents reiterate, that the parties have attempted to settle their dispute by agreeing to an alternative plan of reorganization (hereinafter, "the settlement plan"), although the order confirming that plan is the subject of two separate appeals (one now pending in the Ninth Circuit, the other in the District Court), as well as appeals in the state courts. Petitioners agree with respondents that, if all of those appeals were to be dismissed or denied, review of the petition in this Court would not be necessary, although the Court would have the power to decide the case. *Honig* v. *Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring).

Petitioners had therefore proposed that respondents take a further extension of time to respond to the petition while the appeals of the settlement plan were resolved, which is the ordinary practice in this Court when a settlement may moot a pending petition. This Court is not so constrained, however, that it must immediately confront whether to grant certiorari on the important question presented despite the prospect that

the case could become moot in the future. Petitioners instead suggest that the Court hold the petition in abeyance pending the disposition of the pending appeals. Alternatively, the Court could invite the Solicitor General to express the views of the United States in the case. As respondents note (BIO 5), in light of the importance of the case, the federal government filed a brief for the United States in the court of appeals, taking a position that was contrary to both petitioners and respondents.

Respondents err, however, in their further contention that the petition is already moot no matter how the appeals are resolved. If any of the pending appeals from the settlement plan succeed, petitioners will continue to pursue the plan of reorganization that is the subject of this petition.[2] The appeal is accordingly not moot, by virtue of those pending appeals. Although respondents are correct (BIO 14) that the plan would have to be modified to account for present economic circumstances (a fact that is true as all complex reorganizations proceed), those changes would not involve the plan's basic restructuring transactions and thus would not in any respect moot the preemption question presented by the petition.[3]

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[2] Respondents suggest that petitioners will be required to withdraw the preemption reorganization plan that is the subject of this petition if state court challenges to the settlement plan are rejected. BIO 13. But, even in such circumstances, petitioners would have the right to resubmit a new preemption plan if the federal appeals were ultimately resolved adversely to petitioners. The meaning of Section 1123(a)(5), which is the question presented by the petition, is "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), in light of its widespread implications for the bankruptcy system.

[3] Respondents also note that petitioners might be able to prevail in the pending appeals by persuading the lower courts that the appeals from the settlement plan are themselves "equitably

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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moot." See BIO 12. That is no more than another ground on which petitioners could prevail in those appeals.